Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

THOMAS EINHORN and WILLIAM D. WRIGHT,

Petitioners,

v.

WILLIAM LaCHANCE and HERMANN HOSPITAL,

Respondents.

On Petition For Writ Of Certiorari
To The First Court Of Appeals Of Texas
Houston, Texas

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. The Texas court of appeals concluded that these defamation plaintiffs were limited-purpose public figures because they not only thrust themselves into a public controversy, but in fact created the controversy. Accordingly, at trial the plaintiffs conceded that Texas and federal law required them to prove by clear and convincing evidence that the defendants had acted with actual malice. Despite their concession, can they in this Court challenge the application of that settled law to their slander claim?

2. Whether the Texas appellate court correctly concluded that the evidence in this slander case fell short of being sufficiently clear and convincing to prove actual malice under settled Texas and federal law?

3. Whether Texas and federal law would entitle defamation plaintiffs who suffered no actual injury as a result of the alleged slander to uphold a jury verdict for $500,000?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 1

ARGUMENT 3

I. Under Settled Legal Principles, the Court of Appeals Correctly Held that Einhorn and Wright Failed To Prove Actual Malice 3

A. Einhorn and Wright Were Limited-Purpose Public Figures 3

B. As Limited-Purpose Public Figures, Einhorn and Wright Must Prove Actual Malice by Clear and Convincing Evidence 4

C. The Court of Appeals Correctly Exercised an Independent Examination of the Whole Record To Search for Clear and Convincing Evidence of Actual Malice 5

D. The Court of Appeals Correctly Held that There Was No Clear and Convincing Evidence that LaChance Actually Entertained Serious Doubts About the Truth of his Statement 7

1. Both subjective and objective facts prove LaChance believed what he said was true 8

2. Einhorn and Wright's circumstantial evidence failed to prove the ultimate fact – LaChance's subjective belief about his statement 13

TABLE OF CONTENTS – Continued

Page

3. Suspicion plus suspicion equals more suspicion, but not some evidence 15

a. Falsity does not prove actual malice..... 16

b. Negligent investigation does not prove actual malice..... 17

c. Ill will and personal spite do not prove actual malice 18

II. Insufficient Evidence Proves the Challenged Statement Caused an Actual Injury to Einhorn and Wright..... 22

CONCLUSION 27

TABLE OF AUTHORITIES

Page(s)

CASES

A.H. Belo Corp. v. Rayzor, 644 S.W.2d 71 (Tex. App. – Fort Worth 1982, writ ref'd n.r.e.) 26

Allen v. American Nat'l Ins. Co., 380 S.W.2d 604 (Tex. 1964) 2, 4

Bose Corp. v. Consumers Union, 466 U.S. 485 (1984) ... 5, 8

Browning-Ferris, Inc. v. Reyna, 865 S.W.2d 925 (Tex. 1993) 16

Burgess v. El Paso Cancer Treatment Ctr., 881 S.W.2d 552 (Tex. App. – El Paso 1994, writ denied) 26

Casso v. Brand, 776 S.W.2d 551 (Tex. 1989) ..... *passim*

Channel 4, KGBT v. Briggs, 759 S.W.2d 939 (Tex. 1988) 1, 7, 18

Davenport v. Garcia, 834 S.W.2d 4 (Tex. 1992) 1, 6

Dun & Bradstreet, Inc. v. O'Neil, 456 S.W.2d 896 (Tex. 1970) 18

Einhorn v. LaChance, 823 S.W.2d 405 (Tex. App. – Houston [1st Dist.] 1992, writ dism'd) 23

El Paso Times, Inc. v. Trexler, 447 S.W.2d 403 (Tex. 1969) 18

First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978) 5

Frank B. Hall, Inc. v. Buck, 678 S.W.2d 612 (Tex. App. – Houston [14th Dist.] 1984, writ ref'd n.r.e.), *cert. denied*, 472 U.S. 1009 (1985) 9, 14, 17

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 23

Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6 (1970) 19

TABLE OF AUTHORITIES – Continued

Page(s)

Hagler v. Proctor & Gamble Mfg. Co., 884 S.W.2d 771 (Tex. 1994) 19, 20, 21, 22

Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657 (1989) 19

Larson v. Cook Consultants, Inc., 690 S.W.2d 567 (Tex. 1985) 8, 13

Maewal v. Adventist Health Sys., 868 S.W.2d 886 (Tex. App. – Fort Worth 1993, writ denied) 18

Marathon Oil Co. v. Salazar, 682 S.W.2d 624 (Tex. App. – Houston [1st Dist.] 1984, writ ref'd n.r.e.) 16

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 6, 7, 18, 19

O'Quinn v. State Bar, 763 S.W.2d 397 (Tex. 1988)....1, 7

Proctor & Gamble Mfg. Co. v. Hagler, 880 S.W.2d 123 (Tex. App. – San Antonio), *writ denied per curiam*, 884 S.W.2d 771 (Tex. 1994) 20, 21

Randall's Food Markets, Inc. v. Johnson, 891 S.W.2d 640 (Tex. 1995) 7, 12

Reveley v. Berg Publications, Inc., 601 F. Supp. 44 (W.D. Tex. 1984)..... 23

Ross v. Labatt, 894 S.W.2d 393 (Tex. App. – San Antonio 1994, writ dism'd) 18

San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959)..... 26

Schauer v. Memorial Care Sys., 856 S.W.2d 437 (Tex. App. – Houston [1st Dist.] 1993, no writ)..... 24

Seidenstein v. National Medical Enter., Inc., 769 F.2d 1100 (5th Cir. 1985)..... 20

TABLE OF AUTHORITIES – Continued

Page(s)

Shearson Lehman Hutton, Inc. v. Tucker, 806 S.W.2d 914 (Tex. App. – Corpus Christi 1991, writ dism'd) 17

St. Amant v. Thompson, 390 U.S. 727 (1968) 7, 15

The Outlet Co. v. International Sec. Group, Inc., 693 S.W.2d 621 (Tex. App. – San Antonio 1985, writ ref'd n.r.e.) 17

Time, Inc. v. Pape, 401 U.S. 279 (1971) 18

CONSTITUTIONS

U.S. CONST. amend. I 1

TEX. CONST., art. I, § 8 1

RULE

TEX. R. APP. P. 90(d) 3

MISCELLANEOUS

Ten Years of "Independent Appellate Review" in Defamation Cases, LIBEL DEFENSE RESOURCE CENTER BULLETIN No. 2 6

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Respondents, William LaChance and Hermann Hospital, oppose the petition for writ of certiorari filed by petitioners, Thomas Einhorn and William D. Wright.

STATEMENT OF THE CASE

The opinions of the courts of appeals, reprinted in the appendix to the petition for writ of certiorari, correctly state the facts necessary to understand the questions presented. Any necessary specific clarifications of the record will be made in the argument section of this response.

REASONS FOR DENYING THE WRIT

1. This case was decided under both Texas and federal constitutional law. As literally worded and repeatedly interpreted by the Texas Supreme Court, the Texas Constitution gives decidedly more protection to freedom of speech than does the First Amendment to the United States Constitution. TEX. CONST., art. I, § 8; *see Davenport v. Garcia*, 834 S.W.2d 4, 8-9 (Tex. 1992); *Casso v. Brand*, 776 S.W.2d 551, 556 (Tex. 1989); *O'Quinn v. State Bar*, 763 S.W.2d 397, 402 (Tex. 1988); *Channel 4, KGBT v. Briggs*, 759 S.W.2d 939, 944 (Tex. 1988). This independent and adequate state ground for the lower court's decision suggests that this Court should not invest its limited resources in this particular controversy.

2. The petitioners did not object to the charge submitted to the jury, which under controlling Texas procedural law indicates their complete agreement with the legal principles it contains. 8 S.F. 92. *See, e.g., Allen v. American Nat'l Ins. Co.*, 380 S.W.2d 604 (Tex. 1964). Thus, the petitioners agreed to the submission of an "actual malice" standard in the terms approved by the Texas Supreme Court and this Court. They also agreed not to have the jury consider circumstantial evidence. This procedural rule of waiver is not designed to frustrate the assertion of federal rights, for here the federal and Texas rights of free speech were vindicated by the state appellate court. But the waiver suggests that this is probably not the most appropriate case in which to revisit settled legal rules or to create new rules.

3. The petitioners' real complaint is with the application of the facts to the law, not the law itself. Pet. at 14-20. The legal principles are well settled, as is the standard of review. This Court has no especial reason to review the lower court's treatment of the facts under Texas procedural law, since the Texas and federal constitutional guarantee has been vindicated, rather than frustrated, by the state appellate court.

4. The court of appeals reached a correct decision under Texas and federal law in accordance with settled legal principles that are not in need of revision. The petitioners fail to demonstrate a burning conflict among the lower courts about these issues.

5. Because of its consistency with well settled Texas law, the opinion of the court of appeals was ordered unpublished, which prevents its being cited as authority.

App. 15; *see* TEX. R. APP. P. 90(d). Thus, the decision below is unlikely to assume national importance.

6. The petitioners failed to prove an actual injury, so even if they were correct on the issues raised in their application, this alternative issue concerning the absence of actual damages would either have to be addressed by this Court without the benefit of the lower court having decided it or remanded to the Texas state courts for consideration under Texas law.

7. Because of its disposition of the appeal, the Texas court of appeals did not address the factual insufficiency of the evidence of actual malice under Texas law. Accordingly, at most this Court could only remand the case to the state appellate court for consideration whether whatever new legal principles this Court might announce would change the appellate court's review of the evidence under settled Texas law. This Court probably has more urgent matters of national importance with which to concern itself.

ARGUMENT

I. Under Settled Legal Principles, the Court of Appeals Correctly Held that Einhorn and Wright Failed To Prove Actual Malice

A. Einhorn and Wright Were Limited-Purpose Public Figures

Einhorn and Wright argue that they were not limited-purpose public figures, so the standard of "actual malice" should not apply to them. Pet. at 11-15. If that were to be

their contention, they should have preserved it in the lower court. But by not objecting to the submission of "actual malice" in the charge to the jury, Einhorn and Wright waived any contention that standard did not apply in this case. 8 S.F. 92. *See, e.g., Allen v. American Nat'l Ins. Co.*, 380 S.W.2d 604 (Tex. 1964). Moreover, Einhorn and Wright elected not to raise that contention in their appeal following the trial on the merits. That abandoned contention is now waived.

Einhorn and Wright chose not to contest this issue at trial and on appeal presumably because the evidence was overwhelming. It is recounted at pages 12-13 of the Petition and pages 27-28 of the Appendix. Einhorn and Wright now say that much of that evidence concerns events occurring after they filed suit, so that it cannot be considered. Pet. at 14. The alleged defamation occurred in January 1986. Einhorn and Wright had already created a public controversy many months before then.

Based on the overwhelming evidence and their concessions, the court of appeals correctly concluded Einhorn and Wright were public figures.

B. As Limited-Purpose Public Figures, Einhorn and Wright Must Prove Actual Malice by Clear and Convincing Evidence

Texas and federal law is settled that public figures "must offer clear and convincing affirmative proof [of actual malice] to support a recovery." *Casso v. Brand*, 776 S.W.2d 551, 558 (Tex. 1989). Einhorn and Wright argue that this is not necessarily true for non-media defendants.

Pet. at 11-12. There are at least two flaws with their argument.

First, as discussed above, they waived the contention by not objecting to the jury charge. 8 S.F. 92. Second, it most certainly is required under controlling Texas constitutional law.

Under Texas law, the actual malice standard applies not only to defamation claims against media defendants, but also to claims against non-media defendants such as Hermann Hospital and William LaChance. As the Texas Supreme Court stated in *Casso*, "we are reluctant to afford greater constitutional protection to members of the print and broadcast media than to ordinary citizens." *Casso*, 776 S.W.2d at 554. The supreme court further observed that, even under federal law, "[t]he First Amendment affords equal dignity to freedom of speech and freedom of the press . . . and the '[i]nherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of its source.' " *Id.* (quoting *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 777 (1978)).

C. The Court of Appeals Correctly Exercised an Independent Examination of the Whole Record To Search for Clear and Convincing Evidence of Actual Malice

Einhorn and Wright steadfastly refuse to acknowledge this Court's constitutional command for appellate courts to "make an independent examination of the *whole* record" to ensure that "the judgment does not constitute a forbidden intrusion on the field of free expression." *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984)

(quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-86 (1964)) (emphasis added).

As this Court further stated in *Bose*, "the rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact, whether the factfinding function be performed in the particular case by a jury or by a trial judge." *Bose*, 466 U.S. at 501. "The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact." *Id.* at 511. "Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.' " *Id.*

This characteristic of defamation law probably explains why more than 70 percent of the plaintiffs' verdicts in defamation cases tried to juries nationwide were reversed in whole or in part between 1984 and 1994. *Ten Years of "Independent Appellate Review" in Defamation Cases*, LIBEL DEFENSE RESOURCE CENTER BULLETIN No. 2 at 1, 9, Apr. 30, 1994.

The independent appellate review mandated by the First Amendment to the United States Constitution is perfectly consistent with Texas law. In fact, it represents a *minimum* requirement under Texas law given that the affirmative grant of free speech in article I, section 8 of the Texas Constitution is more broadly worded than the First Amendment. *See generally Davenport v. Garcia*, 834 S.W.2d 4, 8-9 (Tex. 1992). As the Texas Supreme Court has

recognized repeatedly, free speech rights under the Texas Constitution are even broader than those guaranteed under the First Amendment. *Id.*; *see also Casso v. Brand*, 776 S.W.2d 551, 556 (Tex. 1989); *O'Quinn v. State Bar*, 763 S.W.2d 397, 402 (Tex. 1988); *Channel 4, KGBT v. Briggs*, 759 S.W.2d 939, 944 (Tex. 1988).

Accordingly, in recently reversing a defamation judgment, the Texas Supreme Court has itself examined the entire record, not just the evidence in favor of the prevailing plaintiff. *See Randall's Food Markets, Inc. v. Johnson*, 891 S.W.2d 640, 646-47 & n.7 (Tex. 1995). In following settled Texas law in the present case the court of appeals did not err.

D. The Court of Appeals Correctly Held that There Was No Clear and Convincing Evidence that LaChance Actually Entertained Serious Doubts About the Truth of his Statement

In defamation law, "[a]ctual malice . . . is a term of art which is separate and distinct from traditional common law malice." *Casso*, 776 S.W.2d at 558. Thus, "actual malice" exists only when a falsehood is published with knowledge of its falsity, or in reckless disregard of whether it was false. *E.g.*, *New York Times*, 376 U.S. at 280. To prove reckless disregard, Einhorn and Wright were required to prove by clear and convincing evidence that the disputed statement was made even though the speaker actually "entertained serious doubts as to the truth of [its] . . . publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Casso*, 776 S.W.2d at 558.

The stringent standard of review articulated in *Bose* must be employed to weigh proof of actual malice by "clear and convincing evidence." The jury charge – without objection – defined "clear and convincing evidence" as "that measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction that the speaker had knowledge that the statements were false or acted with reckless disregard for whether the statement was false or not." Tr. 451. Thus, "[p]roof by clear and convincing evidence requires proof which is strong, positive, precise, unmistakable, and free from serious or substantial doubt. . . . " *Id.*

Because Einhorn and Wright have never challenged this definition, the court of appeals was *required* to employ it in reviewing the sufficiency of the evidence. 8 S.F. 92; *see Larson v. Cook Consultants, Inc.*, 690 S.W.2d 567, 568 (Tex. 1985). Although the evidence proffered by Einhorn and Wright did not meet the usual Texas standards for factual and legal sufficiency, their evidence is all the more deficient under the definition of clear and convincing evidence applicable in this case.

1. Both subjective and objective facts prove LaChance believed what he said was true

LaChance testified that he believed his statement regarding the conflict of interest was true and entertained no doubts about the truth of his statement. 5 S.F. 86-87. He was still convinced as of the time of trial – more than seven years after making the statement to Strothert – that Einhorn and Wright had a conflict of interest. 5 S.F.

100-02. This subjective evidence of LaChance's state of mind stands uncontradicted in the trial court record.

Einhorn and Wright chant that the jury could disbelieve LaChance. Pet. at 16-20. But LaChance was not impeached; in fact, his credibility was unusual. For instance, he testified to things detrimental to his position: he admitted making the statement about conflict of interest to Strothert, even though Strothert himself could not remember it. *Compare* 5 S.F. 72 (LaChance) *with* 6 S.F. 171-72, 195-96, 204 (Strothert). Thus, this was not a case like *Frank B. Hall, Inc. v. Buck*, 678 S.W.2d 612, 621 (Tex. App. – Houston [14th Dist.] 1984, writ ref'd n.r.e.), *cert. denied*, 472 U.S. 1009 (1985), in which the defendants' veracity was consistently impeached.

In any event, under Texas law "[i]t is not enough for the jury to disbelieve the defendant's testimony"; there must be "clear and convincing affirmative proof" of actual malice. *Casso v. Brand*, 776 S.W.2d 551, 558 (Tex. 1989). Einhorn and Wright lack that proof.

LaChance's testimony was corroborated by objective facts and by other witnesses. In the light of the following undisputed facts, it is easy to see why LaChance entertained no doubts about the truthfulness of his statement that Einhorn and Wright had a conflict of interest when they acted as intermediaries between Hermann's customer, UTMB, and Hermann's competitor, Bayport. 5 S.F. 86-87.

- In late 1985, Hermann was providing fixed-wing air ambulance service to UTMB and Shriner's Hospital in Galveston, 6 S.F. 180; 8 S.F. 41-42; Defendants' Exhibit 7.

- During this time frame the competition among area hospitals to provide air ambulance service was intense, 6 S.F. 35.
- Therefore, around the same time, UTMB was evaluating whether to use an airplane owned by Bayport Aviation to create a fixed-wing air ambulance service for UTMB and Shriner's, 6 S.F. 160-61, 183, 210.
- By this time, Wright had already hired a lawyer and was planning to quit his job at Hermann as soon as he could find a new job, 7 S.F. 88-89.
- Einhorn told Wright that Bayport was interested in "getting into patient transport services," 7 S.F. 80.
- Wright told Strothert at UTMB that Bayport was interested in showing its airplane to UTMB, so Strothert asked Wright to set up a meeting with Bayport, 7 S.F. 46-47, 81.
- Acting on Strothert's request, Wright called Einhorn, who in turn told Bayport about the meeting, 7 S.F. 81.
- Einhorn and Wright attended the December 26, 1985 meeting in Galveston with Strothert of UTMB and Mike Beaumont and Dr. Frank Darby of Bayport, during which Strothert and the other attendees examined Bayport's airplane to see whether it was suitable for air ambulance service, 4 S.F. 10-18; 7 S.F. 81.
- Einhorn and Wright attended the meeting to introduce UTMB and Bayport to one another, 4 S.F. 14; 7 S.F. 82-83.
- At the end of the meeting, Strothert told Wright he wanted a written proposal from

Bayport for the provision of air ambulance services to UTMB, 7 S.F. 82-83.

- Wright, in turn, relayed Strothert's request for a written proposal to Einhorn, 7 S.F. 82-83.
- On December 30, 1985 – a mere four days after the meeting with Strothert – Einhorn and Wright applied for and received an assumed name certificate under the name of "Associated Aviation Consultants," 4 S.F. 18-19; Plaintiffs' Exhibit 2.
- In January 1986, Wright picked up a copy of Bayport's proposal and hand-carried the proposal to Strothert in Galveston, 7 S.F. 83-84.
- The proposal had Wright's name on it, 7 S.F. 83-84.
- After delivering Bayport's proposal to provide air ambulance service to UTMB, Wright helped Strothert's assistant, Dr. Robert Mecker, to evaluate Bayport's proposal, 7 S.F. 84.
- Bayport and UTMB ultimately entered into an agreement under which Bayport provided fixed-wing air ambulance service to UTMB, 7 S.F. 86-87.
- Einhorn and Wright admit they acted as "intermediaries" between Bayport and UTMB, 7 S.F. 77-79; Defendants' Exhibit 42.

In addition to obtaining a copy of the assumed name certificate, as part of his investigation LaChance sought and obtained confirmation from one of the participants, Mike Beaumont of Bayport. 5 S.F. 67-69, 101, 130-31. Beaumont orally confirmed the role played by Einhorn

and Wright as intermediaries. 5 S.F. 69. LaChance then fired Einhorn and Wright, and he responded to Strothert's inquiry by stating they had a conflict of interest. 6 S.F. 23. Several weeks later with litigation apparent, LaChance asked Beaumont to confirm in writing his earlier oral statements to LaChance. 5 S.F. 107. Beaumont refused – not because he had not made the statements – but because he did not want to get involved in a dispute involving his friends, Einhorn and Wright. 5 S.F. 68-70, 111, 117.

LaChance, therefore, had ample reason to believe there was a conflict of interest; he did not act recklessly in stating to Dr. Strothert that Einhorn and Wright had a conflict of interest with Hermann Hospital. That LaChance's conclusion was not wholly fabricated is bolstered by the National Labor Relations Board, whose investigation concluded that Hermann Hospital discharged Wright and Einhorn based on legitimate business considerations arising out of their conflict of interest with Hermann. 10 S.F. 386.

Under Texas law, when defendants have "reasonable grounds to believe that their statements [are] true," they have "established an absence of malice . . . conclusively." *Randall's Food Market, Inc. v. Johnson*, 891 S.W.2d 640, 647 (Tex. 1995). Because LaChance had reasonable grounds to believe there was a conflict of interest, the court of appeals correctly held there was no clear and convincing evidence of actual malice. This application of the procedural standard of review under Texas law should be binding on this Court, since the procedural rule is not being irrationally applied in order to defeat a federal right, but to promote a Texas and federal right.

2. Einhorn and Wright's circumstantial evidence failed to prove the ultimate fact – LaChance's subjective belief about his statement

Without objection, the charge instructed the jury that "clear and convincing" evidence requires proof that is "strong, positive, precise, unmistakable, and free from serious or substantial doubt." Tr. 451. As mentioned, Einhorn and Wright are now bound by that instruction. *See Larson v. Cook Consultants, Inc.*, 690 S.W.2d 567, 568 (Tex. 1985) (court must review sufficiency of the evidence in the light of the jury charge as submitted). The charge, however, did *not* include an instruction about circumstantial evidence. (Einhorn and Wright did not even preserve the request for such an instruction.) It is therefore questionable whether they now can rely on purely circumstantial evidence to try to meet the test of clear and convincing evidence.

But, even if under Texas law circumstantial evidence could ever theoretically fit the charge's definition of clear and convincing evidence, and even if the jury could consider it without being instructed to do so, the meager circumstantial evidence offered by Einhorn and Wright did not establish actual malice by clear and convincing evidence. The circumstantial evidence they presented is an example of forbidden inference stacking: although they may have some evidence of ill will and falsity, neither of those facts sheds any light on the dispositive issue – whether LaChance actually entertained serious doubts about the truth of his statement.

The opinion of the court of appeals does not facially conflict with *Frank B. Hall, Inc. v. Buck*, 678 S.W.2d 612 (Tex. App. – Houston [14th Dist.] 1984, writ ref'd n.r.e.), *cert. denied*, 472 U.S. 1009 (1985). Instead, the court of appeals *cites Frank B. Hall, Inc.* for the proposition that actual malice *can* be proved by circumstantial evidence. App. at 5. Accordingly, there is no conflict, even under Texas law, about the applicable law; instead, the present decision turns solely on whether the particular facts of this case established actual malice. A holding that the particular facts do not amount to actual malice does not create a conflict sufficient to confer jurisdiction. This is all the more true when the case is decided primarily on the particular charge given the jury, rather than on the basis of new rules of law. That was precisely the situation in the present case.

Einhorn and Wright continually contend that ill will can be used to infer actual malice. Pet. at 20. This would be a rule of strict liability. Under their contention, Sam Donaldson could never again report on Ross Perot. Because there is evidence of past hostility, Donaldson could be held liable if he reported a falsehood – regardless of how much he believed in its truth or how much investigation had seemed to confirm it. That result is completely at odds with the freedom of expression regarding public figures envisioned by the United States and Texas Constitutions and mandated by the United States and Texas Supreme Courts.

Einhorn and Wright also argue that the appellate court's ruling will require a confession on the stand from the defendant. Pet. at 19. Not true. This Court itself has

delineated several other ways to prove actual malice, which including proving:

- the communication was fabricated by the defendant;
- it was the product of the defendant's imagination;
- it was based on an unverified anonymous phone call;
- it contains allegations that are so inherently improbable that only a reckless person would put them in circulation; or
- it was published despite obvious reasons to doubt the veracity of the information or source.

St. Amant v. Thompson, 390 U.S. 727, 732 (1968).

Other ways to prove the defendant actually entertained serious doubts about the truth of the statement abound. For instance, the plaintiff can also present "smoking gun" memoranda or comments the speaker made to third persons that reveal the speaker's subjective doubts about the truth of the statement.

But instances of ill will tell one nothing about the speaker's belief as to the truth or falsity of the statement. The problem facing Einhorn and Wright is not the burden of proof. It is their lack of proof.

3. Suspicion plus suspicion equals more suspicion, but not some evidence

In an effort to meet their constitutionally required burden, Einhorn and Wright seize on four scant pieces of

what they call "circumstantial evidence." Under Texas law, "some suspicion linked to other suspicion produces only more suspicion, which is not the same as some evidence." *Browning-Ferris, Inc. v. Reyna*, 865 S.W.2d 925, 927 (Tex. 1993) (footnote omitted). The unanimous court in *Reyna* rendered a take-nothing judgment in favor of the defendant in the face of allegations of tortious interference with contract. Because that cause of action is *not* restricted by the constitutional protections of free speech, its result should be all the more compelling in the present case involving allegations of defamation.

a. Falsity does not prove actual malice

At the outset, the Court should understand that the respondents do not admit falsity; they did not challenge the jury's finding in the court of appeals only out of respect for the applicable standard of review. Falsity can be shown by events occurring after the statement was made, for instance, the fact – unknown to LaChance at the time of his statement – that Einhorn and Wright were not immediately compensated for serving as intermediaries between UTMB and Bayport Aviation. This fact could support the jury's conclusion that there was no conflict of interest.

But, under Texas law, actual malice cannot be inferred from falsity. *E.g., Marathon Oil Co. v. Salazar*, 682 S.W.2d 624, 631 (Tex. App. – Houston [1st Dist.] 1984, writ ref'd n.r.e.). Therefore, the dispositive point on appeal is not falsity, but actual malice – what did LaChance know before he made his statement? Thus, the charge – to which Einhorn and Wright did not object – required that

the statement be "made with a high degree of awareness of its probable falsity. There must be sufficient evidence to conclude that the Defendants in fact entertained serious doubts as to the truth of the publication." Tr. 452. On this point, they lack clear and convincing evidence.

b. Negligent investigation does not prove actual malice

LaChance initially heard rumors about the involvement of Einhorn and Wright with Bayport Aviation's pitch to UTMB through chief pilot Steve Kinnaman. 5 S.F. 62. LaChance did not stop there. Instead, he investigated and discovered the assumed name certificate Einhorn and Wright had applied for and received four days after meeting with Strothert. 4 S.F. 18-19; 5 S.F. 63-65; Plaintiffs' Exhibit 2. LaChance also called Mike Beaumont of Bayport Aviation on January 20, 1986; LaChance learned from Beaumont that Einhorn and Wright had told Beaumont about UTMB's interest in setting up a fixed-wing air ambulance program. 5 S.F. 67-69, 100-02, 130-31. This was occurring while competition among area hospitals to provide air ambulance service was intense. 6 S.F. 35; *see also* 10 S.F. 386.[1]

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[1] LaChance's investigation further distinguishes this case from cases on which Einhorn and Wright rely. *See Shearson Lehman Hutton, Inc. v. Tucker*, 806 S.W.2d 914, 924 (Tex. App. – Corpus Christi 1991, writ dism'd); *Frank B. Hall, Inc. v. Buck*, 678 S.W.2d 612, 620 (Tex. App. – Houston [14th Dist.] 1984, writ ref'd n.r.e.), *cert. denied*, 472 U.S. 1009 (1985); and *The Outlet Co. v. International Sec. Group, Inc.*, 693 S.W.2d 621, 628 (Tex. App. – San Antonio 1985, writ ref'd n.r.e.).

Regardless, under Texas law, a failure to investigate or a negligent investigation is not actual malice. App. at 12 (citing cases). The jury charge – to which Einhorn and Wright did not object – "require[d] proof of more than- . . . negligence or failure to investigate the truth of a statement." Tr. 452. This instruction was consistent with Texas constitutional law:

> [Plaintiffs] were required to offer affirmative proof that [defendant] in fact knew his statements were false, or at least knew they were probably false. If we were to rule that what [defendant] "should have known" is sufficient proof, we would be applying a negligence standard which has been specifically rejected. . . .

Ross v. Labatt, 894 S.W.2d 393, 397 (Tex. App. – San Antonio 1994, writ dism'd).[2] Thus, even falsity *and* negligence are no evidence of actual malice. *Maewal v. Adventist Health Sys.*, 868 S.W.2d 886, 893 (Tex. App. – Fort Worth 1993, writ denied).

c. Ill will and personal spite do not prove actual malice

Unable to muster evidence of actual malice, Einhorn and Wright devote considerable effort to proving LaChance disliked Einhorn and Wright. For some reason only they can know, in their statement of facts Einhorn

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[2] *See also Time, Inc. v. Pape*, 401 U.S. 279, 290 (1971); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964); *Channel 4, KGBT v. Briggs*, 759 S.W.2d 939, 941 (Tex. 1988); *Dun & Bradstreet, Inc. v. O'Neil*, 456 S.W.2d 896, 901 (Tex. 1970); *El Paso Times, Inc. v. Trexler*, 447 S.W.2d 403, 406 (Tex. 1969).

and Wright curiously juxtapose LaChance's statement to Strothert with a meeting that occurred one year later. Pet. at 7-8. LaChance's hostility toward Einhorn and Wright in January 1987 tells one nothing about his beliefs regarding the truth or falsity of his comment to Strothert one year earlier in January 1986. 7 S.F. 187-95. (In fairness, they were not overly fond of LaChance either: Wright and Einhorn once called a news conference at which they accused LaChance of felony theft, interstate transfer of stolen property, witness tampering, and mail fraud, among other crimes. 5 S.F. 98; 7 S.F. 114-15.) There was abundant evidence of ill will and spite infecting the relationship between LaChance, Einhorn, and Wright; however, it is not even a scintilla of evidence of the actual malice required to sustain the jury's verdict.

As the jury was instructed – without objection from Einhorn and Wright – actual malice "requires proof of more than personal spite." Tr. 452. This instruction was consistent with Texas constitutional law: actual malice "does *not* include ill will, spite or evil motive." *Hagler v. Proctor & Gamble Mfg. Co.*, 884 S.W.2d 771 (Tex. 1994) (per curiam); *Casso*, 776 S.W.2d at 558 (emphasis added); *accord Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 666-67 (1989); *New York Times*, 376 U.S. at 280.

Moreover, as a matter of controlling constitutional law:

> Proof of falsity in fact is not enough, nor is proof of a combination of falsehood and general hostility. *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6, 10, 90 S. Ct. 1537, 1539, 26 L. Ed. 2d 6 (1970) ("the jury was permitted to find

> liability merely on the basis of falsehood and generally hostility. This was error of constitutional magnitude, as our decisions have made clear.").

Seidenstein v. National Medical Enter., Inc., 769 F.2d 1100, 1104 (5th Cir. 1985).

Nevertheless, Einhorn and Wright contend that actual malice equals ill will plus something, anything. Thus, they argue that even though animosity alone is not sufficient to establish actual malice, the cumulative weight of ill will among the litigants *plus* other factors such as falsity and failure to investigate can combine to meet the actual malice standard.

Their contention, however, cannot be reconciled with the Texas Supreme Court's most recent pronouncements on actual malice. The Supreme Court of Texas once again highlighted the distinction between actual malice and mere ill will or animosity in *Hagler v. Proctor & Gamble Manufacturing Co.*, 884 S.W.2d 771 (Tex. 1994) (per curiam). As the court reaffirmed in *Hagler*, "Actual malice in the defamation context *does not include* ill will, spite, or evil motive. . . . " *Id.* (emphasis added). Rather, actual malice requires "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *Id.* at 771-72 (quoting *Casso v. Brand*, 776 S.W.2d 551, 558 (Tex. 1989)).

In *Hagler*, the Fourth Court of Appeals had reversed and remanded on factual insufficiency grounds a jury finding that Proctor & Gamble made a defamatory statement about its employee, Hagler, with actual malice. *Proctor & Gamble Mfg. Co. v. Hagler*, 880 S.W.2d 123, 128-29

(Tex. App. – San Antonio), *writ denied per curiam*, 884 S.W.2d 771 (Tex. 1994). The court of appeals relied on the Thirteenth Court of Appeals' decision in *Shearson* for the proposition that actual malice requires a "higher level of culpability" than mere ill will or animosity, suggesting that ill will was a necessary ingredient of actual malice, but was not sufficient by itself to establish actual malice. *Proctor & Gamble Mfg.*, 880 S.W.2d at 126, 128.

In its per curiam denial of Hagler's application for writ of error, the court completely rejected this "culpability" approach to actual malice. The court disapproved of the appellate court's analysis and specifically *rejected* the following language from the appellate court's decision: "[A]ctual malice generally requires a higher level of culpability than mere ill will or animosity. Here, the evidence does not rise to the level of ill will, much less to a higher level of culpability." *Hagler*, 884 S.W.2d at 771 (quoting 880 S.W.2d at 128-29).

Having rejected this conception of actual malice, the Texas Supreme Court repeated its admonishment from *Casso* that, under Texas law, actual malice "does not include ill will, spite or evil motive." *Hagler*, 884 S.W.2d at 771. To make the point perfectly clear, the court stated again that "actual malice is not ill will." *Id.* This is the very distinction between "[a]ctual malice [which], as used in defamation cases, is a term of art which is *separate and distinct* from traditional common law malice." *Casso*, 776 S.W.2d at 558 (emphasis added).

In *Casso* and *Hagler*, the Supreme Court of Texas did not say merely that ill will "standing alone" is insufficient to show malice. Instead, the court framed its exclusion in

the broadest possible terms by holding that actual malice "does not include" and "is separate and distinct from" ill will. Therefore, Einhorn and Wright cannot bootstrap their way to an actual malice finding by first pointing to evidence of ill will and then contending that ill will combined with other evidence establishes actual malice. Because actual malice "does not include" and "is separate and distinct from" ill will, evidence of ill will can be neither the sole indicator of actual malice nor even a component of actual malice. Otherwise, actual malice would include ill will. As *Hagler* and *Casso* make clear, the existence of ill will proves nothing more than the existence of ill will.

Stated another way, *Hagler* and *Casso* teach that actual malice does not sit at the far end of a spectrum that begins with mere animosity. One cannot travel along an imaginary path on which animosity gradually blends into actual malice by showing there was "a lot" of ill will among the litigants, or showing evidence of animosity "plus something else." As this Court has stressed, actual malice exists on an entirely different plane than does mere ill will or animosity. Making the leap from mere ill will to the higher plane of actual malice requires a very specific type of evidence: knowledge of, or serious doubts about, falsity. Einhorn and Wright have no such proof.

II. Insufficient Evidence Proves the Challenged Statement Caused an Actual Injury to Einhorn and Wright

In the court of appeals, Einhorn and Wright understandably wanted to avoid a detailed analysis of their

non-existent damages evidence. They excused their avoidance by contending damages must be presumed because the statement at issue was slanderous *per se* as a matter of law. Br. of Appellees at 19-22. But their contention ignores the constitutional dimensions of public figure defamation suits, which require proof of an actual injury. *E.g., Reveley v. Berg Publications, Inc.*, 601 F. Supp. 44, 45 (W.D. Tex. 1984).

For a public figure to recover damages, the record also must contain evidence of an actual injury. "Balancing the important first amendment interests present when the alleged defamation concerns a public figure such as this plaintiff against providing compensation for injuries to reputation, the Supreme Court has directed that proof of actual injury . . . precede recovery." *Reveley v. Berg Publications, Inc.*, 601 F. Supp. 44, 45 (W.D. Tex. 1984); *see also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345, 348-50 (1974). Actual injury means impairment of reputation and standing in the community, personal humiliation, mental anguish, or economic loss. *Id.*

In any event, the law of the case doctrine bars this contention. The appellate court's first opinion concluded that the challenged conflict of interest statement did *not* constitute slander *per se*. *Einhorn v. LaChance*, 823 S.W.2d 405, 411 (Tex. App. – Houston [1st Dist.] 1992, writ dism'd). Determining whether a statement is capable of defamatory meaning presents a threshold question of law for the court to decide. *Id.* In accordance with the appellate court's prior opinion, the jury was asked in question no. 1 whether the challenged "conflict of interest" statement was defamatory. Tr. 447; *see id.* "Only if the court determines the language is ambiguous or of doubtful

import should the jury determine the statement's meaning and the effect of the statement's publication on the ordinary reader." *Schauer v. Memorial Care Sys.*, 856 S.W.2d 437, 446-47 (Tex. App. – Houston [1st Dist.] 1993, no writ).

Given that the conflict of interest statement at issue here was ambiguous or of doubtful import, Einhorn and Wright cannot prove it is "so obviously hurtful" that, as a matter of law, the statement constitutes slander *per se*. Thus, their presumed damages argument collapses. They cannot explain exactly how evidence relating to a defunct wrongful termination claim can constitute legally or factually sufficient evidence of actual injury from defamation.

The record demonstrates that Einhorn and Wright proffered legally and factually insufficient evidence to establish that the challenged "conflict of interest" statement proximately caused any harm – much less $250,000 worth of harm to each of them. Recall that following the first appeal, the only allegedly defamatory statement in issue was the following:

> [I]n response to a question by Dr. Strothert at UTMB in a telephone call on January 22, 1986, [LaChance said] that Plaintiffs Don Wright and Tom Einhorn had a "conflict of interest" with Hermann Hospital.

Tr. 446.

The recipient of LaChance's comment, Dr. Strothert at UTMB, testified unequivocally that he did not think any less of Einhorn or Wright as a result of what LaChance said to him. 6 S.F. 195-96. In fact, at trial,

Strothert had no recollection whatsoever of the statement having been made. 6 S.F. 171-72, 195-96, 204. Strothert's reaction explains why no subsequent prospective employers told Wright they would not hire him because of the "conflict of interest" statement. 7 S.F. 116-18. Wright himself acknowledged the more plausible explanation that his difficulty in obtaining a job after Hermann Hospital fired him stemmed from

(1) his heavy and highly public involvement in NEMSPA, which was not popular among industry employers; and

(2) the 1983 crash of a helicopter Wright was piloting, for which the NTSB found Wright at fault and temporarily suspended his license.

7 S.F. 116-20, 121-26; Defendants' Exhibits 34, 35, 36, 37.

Although Einhorn and Wright both offered conclusory testimony that they felt the statement harmed their reputations, 4 S.F. 62-65, 7 S.F. 73, neither was able to tie the conflict of interest statement to any specific monetary losses. Einhorn and Wright produced no witness who testified that a prospective employer refused to hire them because of the "conflict of interest" statement. Einhorn acknowledged that he never sought treatment from a physician for his alleged mental anguish and suffering. 4 S.F. 62-63.

Both testified that they lost approximately $100,000 in income during the three years after they were fired. 3 S.F. 153; 7 S.F. 69-71. These sums, however flow from Hermann Hospital's decision to fire Einhorn and Wright; they have nothing to do with the separate issue of

whether the "conflict of interest" statement by William LaChance to Dr. Strothert on January 22, 1986 caused harm to them. Absent evidence connecting the asserted harm to the asserted falsehood, Einhorn and Wright cannot recover. *See A.H. Belo Corp. v. Rayzor*, 644 S.W.2d 71 (Tex. App. – Fort Worth 1982, writ ref'd n.r.e.) (defamation plaintiff's testimony that he was embarrassed and humiliated, that he could name no one who thought less of him because of disputed article, and that he had suffered no financial injury amounted to no evidence of damages and could not support $1 million actual damage award).

Undaunted by the NLRB's rejection of their wrongful termination claims, Einhorn and Wright used their single remaining slander claim as a pretext for retrying their already dead wrongful termination suit. To that end, they introduced copious evidence relating to alleged safety problems in the Hermann Hospital Life Flight program and Hermann Hospital's response to their complaints. This evidence, however, cannot support Einhorn's and Wright's surviving slander claim because the NLRB has primary and exclusive jurisdiction to hear and determine claims that an employee was discharged for engaging in concerted activity protected by the National Labor Relations Act. *See, e.g., San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244-45 (1959); *cf. Burgess v. El Paso Cancer Treatment Ctr.*, 881 S.W.2d 552, 555-56 (Tex. App. – El Paso 1994, writ denied) (Texas common law recognizes no private "whistleblower" cause of action). It is no evidence of slander, LaChance's state of mind, or damages proximately caused by the challenged statement.

Having abandoned any effort to prove the single slander claim that was remanded for trial, opting instead to resurrect their wrongful discharge case, Einhorn and Wright now must try to uphold their slander judgment on a record bereft of evidence of actual malice or actual damages proximately caused by the "conflict of interest" statement. Their effort must fail in light of the record before this Court and controlling Texas law.

CONCLUSION

Respondents, William LaChance and Hermann Hospital, ask this Court to deny the petition for writ of certiorari, or to affirm the take-nothing judgment, or, alternatively, to remand this cause to the court of appeals or for a new trial. The respondents further request all other relief to which they may be entitled.

Respectfully submitted,

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